LIBRARY
SUPREME COURT, U. S.

FILED
MAR 2 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 688

HENDERSON MILOM,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,
a Corporation,

Respondent.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

E. M. BURKE
10 S. LaSalle Street
Chicago 3, Illinois
Attorney for Petitioner

LEO K. WYKELL
10 S. LaSalle Street
Chicago 3, Illinois
Of Counsel.

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Statement 1, 2

Reasons for Granting the Writ 3

Conclusion 3

CITATIONS.

Cases:

Home Ins. Co. of New York et al. v. Pavila, 212 F. 2d 731 2

Gibson v. Elgin, Joliet & Eastern Railway Company, 246 F. 2d 834 3

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 503 3

Ferguson v. St. Louis-San Francisco Ry. Co., No. 799, 26 Law Week 3264. 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1957

No. 688

HENDERSON MILOM,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,

Respondent.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Henderson Milom, petitioner, filed herein his petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. This petition was denied on March 3, 1958.

Petitioner now respectfully requests rehearing of the order denying the petition for certiorari on the substantial grounds set forth herein.

STATEMENT.

This action was brought by Henderson Milom, a colored, dining car pantryman, as a result of injuries sustained while in the course of lifting a fifty (50) pound block of ice, using tongs supplied by the employer railroad.

In the trial Court the jury returned a verdict for the plaintiff and judgment was entered on the verdict in favor of the plaintiff and against the defendant.

The Court of Appeals decided that the trial Court should have directed a verdict for the defendant "at the close of plaintiff's evidence." (Appendix A, page 2a) This question was not before the Court, the defendant did not rest on its motion but proceeded to produce evidence. It is hornbook law, that once the defendant proceeds with evidence, so proceeding constitutes a waiver of the defendant's motion for a directed verdict at the close of plaintiff's case. One of the many cases so holding is, *Home Ins. Co. of New York et al.* v. *Pavila*, 212 F. 2d 731 (C.A. 1st) where it was said on page 733:

> "It is well-settled that if a motion under Rule 50(a) of the Federal Rules of Civil Procedure 28 U.S.C.A., asking for a directed verdict at the close of the plaintiff's case is denied, and the defendant thereupon presents his own evidence, this constitutes a waiver of the motion;"

The Court of Appeals in its opinion (Appendix A, 3a) states the trial Court correctly refused to permit an answer to the inquiry, "was the degree of the sharpness of the blades about the same?" The transcript of proceedings (App. 12, Rec. 55) shows the ruling as follows:

> "The Court: Sustained. He has already answered the question."

It is apparent that the trial Court concluded, and correctly so, that when the witness identified the rings in evidence, as being exactly like those used on the occasion in question it was unnecessary to put any further questions regarding the sameness of the component parts.

This decision of the Court of Appeals is in direct conflict with another decision of the same Circuit, *Gibson* v. *Elgin, Joliet & Eastern Railway Company*, (1957) 246 F. 2d 834, certiorari denied 78 S. Ct. 270.

REASONS FOR GRANTING THE WRIT.

1. There is conflict between this decision and the decision in *Gibson* v. *Elgin, Joliet & Eastern Railway Company*, (1957) 246 F.2d 834, certiorari denied 78 S. Ct. 270, and every decision of the United States Supreme Court beginning with *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 503, 77 S. Ct. 443, the last in line being *Ferguson* v. *St. Louis - San Francisco Ry. Co.*, ... U.S. ....., October 1957 Term, No. 799, 26 Law Week 3264.

2. For the sake of uniform administration of the Federal Employers' Liability, certiorari should be granted.

3. The plain error of law committed by the Court of Appeals should be corrected.

4. The instant decision of the Court of Appeals is a serious infringement upon trial by jury in a Federal Employers' Liability Case.

CONCLUSION.

It is respectfully requested that this Honorable Court reconsider the petition for writ of certiorari.

EDWARD M. BURKE,
Attorney for Petitioner.

LEO K. WYKELL,
Of Counsel.

CERTIFICATE.

The undersigned certifies that this petition is presented in good faith and not for delay. It is restricted to the rule governing grounds specified on petition for rehearing.

EDWARD M. BURKE
10 S. LaSalle Street
Chicago 3, Illinois